Nos. 88-250 and 88-278

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In the Supreme Court of the United States

OCTOBER TERM, 1988

MICHAEL LAZAR, PETITIONER

v.

UNITED STATES OF AMERICA

STANLEY FRIEDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners were entitled to reversal of their convictions on appeal based on preindictment publicity that allegedly affected the grand jury's charging decision.

2. Whether petitioner Lazar was properly convicted of the single RICO conspiracy charged in the indictment.

3. Whether petitioner Friedman's Sixth Amendment right to confront the witnesses against him was abridged by the district court's evidentiary rulings or by his counsel's alleged conflicts of interest.

4. Whether petitioner Friedman's RICO convictions must be reversed because one of the five predicate acts on which the conviction was based alleged a theory of mail fraud invalidated by this Court's decision in *McNally* v. *United States*, No. 86-234 (June 24, 1987).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-104a)[1] is reported at 854 F.2d 535. The rulings of the district court (Pet. App. 1b-7b; 88-278 Pet.

[1] "Pet. App." refers to the appendix to the petition filed by petitioner Lazar in No. 88-250. "88-278 Pet. App." refers to the appendix to the petition filed by petitioner Friedman in No. 88-278.

App. 1c-6c, 1d-10d) on various pretrial motions are reported at 635 F. Supp. 782, 636 F. Supp. 462, and 638 F. Supp. 816.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1988. The petition for a writ of certiorari in No. 88-250 was filed on August 10, 1988. The petition for a writ of certiorari in No. 88-278 was filed on August 13, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conducting and participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c), and conspiring to conduct and participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d). Each of the petitioners was also convicted on two counts of mail fraud, in violation of 18 U.S.C. 1341.

Petitioner Friedman was sentenced to a term of 12 years' imprisonment to be followed by five years' probation. He was also ordered to forfeit certain securities. Petitioner Lazar was sentenced to three years' imprisonment and a $200,000 fine and was ordered to forfeit $45,000. The court of appeals vacated petitioners' mail fraud convictions based on this Court's intervening decision in *McNally* v. *United States*, No. 86-234 (June 24, 1987), but affirmed their convictions on the racketeering counts (Pet. App. 1a-104a).

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 5a-31a).

It showed that petitioners participated in a conspiracy whose object was to transform the New York City Parking Violations Bureau ("PVB") from a public agency devoted to the performance of public services for the citizens of New York into a vehicle for the corrupt profit of county party leaders, public officials, private businesses, and private businessmen. From late 1979 until the end of 1985, through an extended pattern of bribery, petitioners and their co-defendants enriched themselves by buying and selling PVB contracts and corruptly influencing decisions made by City officials associated with the PVB.

2. The rulings that are the subject of the petitions and their background are as follows:

a. Both petitioners filed pretrial motions claiming that the government had leaked information concerning grand jury proceedings to the press in violation of Fed. R. Crim. P. 6(e) and requesting a hearing on these allegations. The district court acknowledged that there had been massive publicity surrounding the case, as well as frequent attributions by the press to unidentified Department of Justice sources. However, noting the petitioners' concession that "there is no authority suggesting that dismissal of an otherwise valid indictment would be appropriate" because of disclosure of information during the preindictment stage (Pet. App. 7b), the court concluded that "[a]ny inquiry we might conduct to try to determine responsibility for the unauthorized leaks could only unleash a flood of publicity which would dwarf anything heretofore experienced, and would certainly do nothing to relax the pressures under which the trial would proceed" (*id.* at 6b).[2]

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[2] Steps were taken to assure that the defendants would not be prejudiced at trial by publicity. On the defendants' mo-

On appeal, petitioners did not contend that they had been prejudiced at trial by the preindictment publicity. Instead, they renewed their argument that the indictment should have been dismissed because of that publicity. The court of appeals "assume[d] *arguendo* that the government persistently leaked information about grand jury proceedings to the press in an unethical and unlawful campaign both to induce the cooperation of potential witnesses and to supplant state prosecutorial efforts in a bureaucratic turf fight" (Pet. App. 101a). Nevertheless, relying on this Court's decision in *United States* v. *Mechanik*, 475 U.S. 66 (1986), the court of appeals held that given the petit jury's guilty verdict, " 'any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt' " (Pet. App. 102a (quoting *Mechanik*, 475 U.S. at 70)). That was because, as the court of appeals explained, the " 'petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt' " (Pet. App. 102a (quoting *Mechanik*, 475 U.S. at 70)).[3]

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tion, with the government's consent, the district court transferred the trial to the District of Connecticut at New Haven. The jury was drawn from the District of Connecticut's Hartford jury pool, outside the New York metropolitan area, and extensive voir dire was conducted on possible exposure to pretrial publicity. Pet. App. 6a.

[3] It was immaterial, the court of appeals found, that the misconduct in *Mechanik* had not been brought to the attention of the trial court before the commencement of trial. The court held that where, as here, the district court has proceeded with trial and the court of appeals is reviewing a conviction, the rationale underlying *Mechanik* is fully applicable. Pet. App. 102a-103a.

The court recognized that "*Mechanik* by its terms does not bar reversal of a conviction when misconduct before the grand jury 'has deprived [the] defendant of a fair determination of the issue of guilt or innocence' " (Pet. App. 103a-104a (citation omitted)). But it concluded that petitioners "simply cannot show resultant prejudice from the publicity surrounding the grand jury proceedings and make no claim that the Connecticut petit jury was affected by the government's misconduct" (Pet. App. 104a). Under *Mechanik*, the court held, "the government's conduct does not now afford [petitioners] a basis upon which to claim error" (Pet. App. 104a).

b. The indictment alleged a single RICO conspiracy to conduct the affairs of the PVB through a pattern of racketeering activity. Petitioners moved before trial, in the alternative, for dismissal because of misjoinder (Fed. R. Crim. P. 8(b)) or for a severance (Fed. R. Crim. P. 14). The district court denied the motions. It observed that the essence of the allegations in the indictment was that the PVB had been converted into a racketeering enterprise, and that at some point each defendant knowingly became involved in contributing to the success of that enterprise through a pattern of racketeering activity. "If the government can prove this as to each defendant," the district court concluded, "each would be properly convicted of a violation of RICO. It follows that they are properly joined in one indictment under Fed. R. Crim. P. 8" (Pet. App. 2b-3b). The district court also rejected petitioners' contentions that they would be prejudiced by "spillover" evidence of corrupt acts by other defendants in which they did not participate. Pet. App. 3b-4b.

At the close of the government's case, Lazar moved for a severance based upon an alleged variance be-

tween the indictment and the proof regarding the existence of a single conspiracy. The district court denied the motion. The court instructed the jury that it could not convict a defendant unless the government had proved the defendant knowingly and willfully participated in the particular conspiracy alleged in the indictment, and that it "would be wholly immaterial that the Government might prove that the defendant was involved in other or different conspiracies." Pet. App. 53a n.5. Neither petitioner objected to that instruction at trial (Pet. App. 53a).

The court of appeals rejected Lazar's claims that he should not have been indicted and tried as a participant in a single RICO conspiracy with the other defendants, and that the evidence was insufficient to sustain his conviction on that theory. With respect to the indictment, the court held that "the indictment properly alleged Lazar's membership in an overall conspiracy to operate the PVB as a racketeering enterprise" (Pet. App. 52a).

Similarly, the court of appeals rejected Lazar's contention, advanced for the first time after the trial, that the jury instruction on the conspiracy count was inadequate (Pet. App. 53a), and the court had "no difficulty in concluding that the evidence supported the jury's finding of a single RICO conspiracy" (Pet. App. 55a). The court explained that "[so] long as the alleged RICO co-conspirators have agreed to participate in the affairs of the same enterprise, the mere fact that they do not conspire directly with each other 'does not convert the single agreement to conduct the affairs of an enterprise through a pattern of racketeering activity into multiple conspiracies' " (Pet. App. 55a (citation omitted)). It went on to find that the jury could have concluded "that Lazar knew that he was not simply partici-

pating in isolated bribery conspiracies but rather in the broader conspiracy charged in the indictment, a conspiracy to operate the PVB for private gain through a pattern of racketeering activity." Pet. App. 55a.

c. Before trial, Friedman served subpoenas on two physicians, seeking the psychiatric records of Geoffrey Lindenauer, a former Deputy Director of the PVB who was a major government witness. Lindenauer moved to quash the subpoenas. After reviewing one doctor's records in camera, the district court granted the motion, holding that the documents were subject to the psychotherapist-patient privilege. 88-278 Pet. App. 2c-6c. The court of appeals affirmed (Pet. App. 73a-75a). After conducting its own in camera review, the court agreed that a true psychotherapist-patient relationship existed and that nothing in the records cast any doubt upon Lindenauer's ability to understand and relate the truth (*ibid.*). In any event, the court held, any error there might have been in quashing the subpoena was harmless beyond a reasonable doubt. "The notes contain little, if any, material that would have been useful in cross-examining Lindenauer," the court found, and "they could not have had even a marginal impact upon the jury's assessment of Lindenauer's credibility" (*id.* at 74a).

The district court also excluded evidence that former Queens Borough President Donald Manes had lied to law-enforcement authorities about his January 1986 suicide attempt. Friedman claimed that this evidence was admissible under Fed. R. Evid. 806 to impeach the credibility of out-of-court declarations by Manes to which Lindenauer had testified. The court of appeals upheld the district court's ruling, finding that "[t]he evidence of Manes' false * * * story had

no conceivable bearing upon the credibility of his statements to Lindenauer in furtherance of the conspiracy" and noting that other evidence bearing on Manes' credibility was admitted. Pet. App. 68a-73a.

Friedman also argued to the court of appeals that his trial counsel, Thomas P. Puccio, "sidestepped crucial lines of cross-examination" because of conflicts of interest resulting from Puccio's representation of Robert Richards, an indicted conspirator, and Melvin Lebetkin, an unindicted conspirator, and Puccio's participation in a conversation recorded by a Jerome Driesen, an informant who later became a government witness. After reviewing the details of those contentions at length, the court held that Friedman waived the first alleged conflict and that the other two alleged conflicts were not conflicts at all. Pet. App. 75a-89a.

The alleged conflicts arising from Puccio's prior representation of Richards and Lebetkin were first the subject of a pretrial motion by the government to disqualify Puccio. Friedman vigorously opposed that motion. He and Puccio submitted affidavits in which they denied the existence of any conflict, asserted that Friedman would suffer irreparable injury if Puccio were disqualified, reported that Friedman had consulted independent counsel who concurred that there was no conflict, and expressly waived "the benefit of any purported conflict." See Pet. App. 76a-80a. Under these circumstances, and in light of the fact that Friedman had previously served as an Assistant District Attorney, the court of appeals concluded that Friedman's express waiver was "knowing and intelligent" (Pet. App. 81a).

The court also held that Puccio's defense of Friedman had not been compromised by his prior representation of Lebetkin. After finding that Puccio's

cross-examination of two witnesses had not been limited in any meaningful way by the prior representation, the court held that Friedman had failed to show either "an 'actual conflict of interest,' *Cuyler* v. *Sullivan*, 446 U.S. 335, 349 (1980), or a 'lapse in representation,'" *United States* v. *Iorizzo*, 786 F.2d 52, 58 (2d Cir. 1986). Pet. App. 82a.

Friedman's final claim of conflict arose out of "a curious incident" in which a government witness and informant, Jerome Driesen, surreptitiously tape-recorded a meeting at which attorney Harold Borg and Puccio were present. In a post-trial motion and on appeal, Friedman contended that Puccio may have been representing Borg at the time and had limited his cross-examination of Driesen at trial because of that representation. After reviewing the facts at length, the court of appeals concluded that "the Driesen tape would have been of no use to Friedman's defense, and * * * there was thus neither an actual conflict of interest nor a lapse in Puccio's representation of Friedman." Pet. App. 89a.

d. On appeal, the government conceded that this Court's decision in *McNally* v. *United States*, No. 86-234 (June 24, 1987), required that petitioners' mail fraud convictions be vacated. In a reply brief, petitioner Friedman argued that reversal of his RICO convictions was also required. The court of appeals rejected that contention, finding that Friedman had not been prejudiced by the submission of that theory to the jury. Pet. App. 100a n.11.

ARGUMENT

1. Petitioner Lazar contends (88-250 Pet. 13-18) that the court of appeals' disposition of his preindictment publicity claim conflicts with this Court's decisions in *United States* v. *Mechanik*, 475 U.S. 66 (1986), and *Bank of Nova Scotia* v. *United States*, No. 87-578 (June 22, 1988). Petitioner Friedman offers a variation on that theme, asserting (88-278 Pet. 7-12) that the government's alleged violations of Fed. R. Crim. P. 6(e) forced him to seek a change of venue and thus effectively denied him his right to be tried in the judicial district where the crime was committed. See U.S. Const. Art. III, § 2, Cl. 3; Amend. VI Neither, however, raises any claim regarding the effect of publicity on the trial itself, nor does either dispute that he received a full and fair adjudication of his case based on the facts proved at trial and nothing else. Under these circumstances, petitioners' claims warrant no further review by this Court.[4]

There is no conflict of any kind between the court of appeals' ruling and *Mechanik*. In *Mechanik*, this Court held that notwithstanding a violation of Fed. R. Crim. P. 6(d)—the simultaneous presence and testimony of two government witnesses before the grand jury—"the petit jury's verdict rendered harmless any conceivable error in the charging decision that might have flowed from the violation" (475 U.S.

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[4] The court of appeals assumed arguendo that the government violated Fed. R. Crim. P. 6(e) and leaked confidential information concerning the grand jury to the media. The United States Attorney's office has, however, consistently denied responsibility for any violations of Rule 6(e). See, *e.g.*, Gov't C.A. Br. 113-118.

at 73). The Court explained that "the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt" (*id.* at 70). As the court of appeals recognized, all of the considerations that this Court found persuasive in *Mechanik* apply to this case. Here, as in *Mechanik*, the defendants' convictions have confirmed the existence of probable cause to indict. Reversal of the convictions at this stage will not "restore [these petitioners] to the position in which [they] would have been had the indictment been dismissed before trial." *Id.* at 71. And the "substantial social costs" that weigh against reversal "when an error has had no effect on the outcome of the trial" (*id.* at 72) are just as compelling here as in *Mechanik*.

Mechanik reserved the question of what remedies might be appropriate if allegations of a violation of Rule 6 are brought to a district court's attention before the commencement of trial. 475 U.S. at 72. The application of the principles of *Mechanik* to that situation, however, presents no substantial issue calling for this Court's review. A number of courts of appeals have applied *Mechanik* to cases in which pretrial motions, based on a wide variety of alleged defects in grand jury proceedings, were made.[5] As

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[5] *See United States* v. *Hefner*, 842 F.2d 731 (4th Cir. 1988) (claim that grand jury foreman was ineligible to serve); *United States* v. *Fountain*, 840 F.2d 509, 513-515 (7th Cir. 1988) (claim that prosecutor presented hearsay evidence to the grand jury and failed to present exculpatory evidence); *United States* v. *Bucci*, 839 F.2d 825, 831-832 & n.6 (1st Cir. 1988) (claim that prosecutor failed to impeach perjurious testimony before the grand jury and offered false and inflammatory evidence); *Porter v. Wainwright*, 805 F.2d 930,

these courts have acknowledged, the grounds underlying *Mechanik*—the necessary implication of a conviction and the costs of a reversal on appeal—are not limited to cases in which alleged defects in grand jury proceedings are raised after a trial has begun.

Contrary to petitioner Lazar's assertion (88-250 Pet. 15-16), this Court's recent decision in *Bank of Nova Scotia* v. *United States*, No. 87-578 (June 22, 1988), does not suggest otherwise. There the Court held that an indictment may not be dismissed for prosecutorial misconduct occurring in grand jury proceedings absent a showing of prejudice to the defendant (slip op. 3). In assessing such claims, dismissal of the indictment is appropriate only " 'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations" (*id.*, slip op. 5 (quoting *Mechanik*, 475 U.S. at 78) (O'Connor, J., concurring)). Far from supporting petitioners' position, *Bank of Nova Scotia* reaffirmed

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941-942 (11th Cir. 1986), cert. denied, No. 86-6811 (June 8, 1987) (claim that grand juror was related to victim and that prosecutor wrongfully withheld that information); *United States* v. *Thomas*, 788 F.2d 1250, 1254 (7th Cir.), cert. denied, 479 U.S. 853 (1986) (claim that prosecutor asked the defendant improper questions before the grand jury, failed to present exculpatory evidence, and improperly advised the grand jury that the defendant's legal theories were incorrect). But see *United States* v. *Taylor*, 798 F.2d 1337, 1340 (10th Cir. 1986) (in context of ruling on interlocutory appeal, *Mechanik* held not to apply to violations of Rule 6 that affect "fundamental fairness" of criminal proceedings).

The courts of appeals have also held that *Mechanik* is not limited to violations of Fed. R. Crim. P. 6(d). Pet. App. 103a; *United States* v. *Hintzman*, 806 F.2d 840, 843 (8th Cir. 1986); *Porter* v. *Wainwright*, *supra*, 805 F.2d at 942; *United States* v. *Benjamin*, 812 F.2d 548, 552-553 (9th Cir. 1987).

the basic principle, applied in *Mechanik* and by the court of appeals in this case, that indictments or convictions should not be struck down solely as a means of disciplining prosecutors if the error has not prejudiced a defendant's substantial rights. Moreover, in *Bank of Nova Scotia*, the district court had dismissed an indictment when only one of five defendants had gone to trial on only one of the 27 counts. The case was not one in which there was "a verdict of guilty to serve as a basis for holding that no prejudice in the charging decision occurred * * *." *United States* v. *Kilpatrick*, 821 F.2d 1456, 1468 (10th Cir. 1987), aff'd *sub nom. Bank of Nova Scotia*, *supra*. In this case, there is such a verdict.

In any event, this is not an appropriate case in which to explore the reach of *Mechanik*. There is no conflict among the circuits on the issue petitioners raise. Moreover, neither court below found any violation of Rule 6. While petitioners complain of the district court's refusal to grant them a hearing on that issue, the court based its decision in part on petitioners' failure (except for Friedman's request for a severance) to "suggest[] any relief to which they would be entitled should [the court] succeed in fastening responsibility [for preindictment publicity] on any person." Pet. App. 6b-7b. Though numerous defendants have urged courts to dismiss indictments based on preindictment publicity, petitioners fail to cite a single decision (and we know of none) where an indictment has been dismissed on that ground.[6] Thus,

[6] In numerous cases, courts have declined to dismiss indictments as a remedy for preindictment publicity. *E.g.*, *Beck* v. *Washington*, 369 U.S. 541 (1962); *United States* v. *Burke*, 700 F.2d 70 (2d Cir.), cert. denied, 464 U.S. 816 (1983); *United States* v. *Brien*, 617 F.2d 299, 313 (1st Cir.), cert. denied, 446 U.S. 919 (1980); *Silverthorne* v. *United States*,

this case presents only a hypothetical case of grand jury misconduct, of a type which to our knowledge has never before led to dismissal of an indictment, and which concededly did not affect the fairness of the trial.

Lazar urges that the decision below countenances "the existence of an unfettered prosecutorial power to defy and break the law while purportedly engaged in enforcing it" (88-250 Pet. 14), and results in a "total judicial incapacity to enforce Rule 6" (*id.* at 17). These rhetorical flourishes and others like them ignore the availability of remedies that this Court has recognized for grand jury misconduct. Violations of Rule 6(e) may subject a prosecutor to a finding of contempt,[7] as well as disciplinary sanctions and administrative sanctions within the Department of Justice through its Office of Professional Responsibility. A court may also chastise the prosecutor in a published opinion. See *Bank of Nova Scotia*, slip op. 12 (detailing possible sanctions for misconduct before a grand jury). These remedies "allow the court to focus on the culpable individual rather than granting a windfall to the unprejudiced defendant" who has been convicted after a fair trial (*ibid.*).

Contrary to petitioner Friedman's suggestion, this case presents no question involving his right to a speedy trial in the district in which the crimes were

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400 F.2d 627, 632-634 (9th Cir. 1968); *United States* v. *Osborn*, 350 F.2d 497, 506-507 (6th Cir. 1965), aff'd, 385 U.S. 323 (1966); *Gorin* v. *United States*, 313 F.2d 641, 645 (1st Cir.), cert. denied, 374 U.S. 829 (1963); *United States* v. *Nunan*, 236 F.2d 576, 593 (2d Cir. 1956), cert. denied, 353 U.S. 912 (1957). See *United States* v. *Myers*, 510 F. Supp. 323, 325-326 (E.D.N.Y. 1980) (collecting cases).

[7] Despite their strident claims of misconduct, neither petitioners nor any of their co-defendants sought a contempt citation in the district court.

committed. See 88-278 Pet. i, 7-8. The district court did not find that an impartial jury could not be impanelled promptly in the Southern District of New York. To the contrary, it granted a change of venue because the defendants moved for one and the government did not object. The court stated that it would not have moved the trial had the government not consented. C.A. App. 1141. Thus, petitioners' contention that preindictment publicity "polluted the entire vicinage" (88-250 Pet. 15; see 88-278 Pet. i) is without foundation in the record.

2. Lazar next contends (88-250 Pet. 18-24) that the proof at trial showed multiple conspiracies rather than the single conspiracy charged in the indictment, that he was prejudiced by this alleged variance from the theory charged in the indictment, and that the district court erred in denying his motion for a severance.

All of these issues turn on whether there was sufficient evidence to convict Lazar of participating in the single conspiracy charged in the indictment. The district court instructed the jury on the issue of multiple conspiracies, and Lazar failed to object to that instruction. The court of appeals, reviewing for plain error, found that the district court's instruction was sufficient to ensure that the jury "could not have convicted Lazar of some other conspiracy" (Pet. App. 54a). Under these circumstances, the question whether the evidence established a single conspiracy or multiple conspiracies was a question of fact for the jury. *United States* v. *Alessi*, 638 F.2d 466, 472 (2d Cir. 1980); *United States* v. *Bagaric*, 706 F.2d 42, 63 n.18 (2d Cir.), cert. denied, 464 U.S. 840 (1983).

The court of appeals' analysis of the sufficiency of the government's evidence of a single conspiracy was

unexceptionable. The court acknowledged at the outset that proof of a single conspiracy requires evidence that the alleged co-conspirators "agreed on a 'common purpose' that sufficed to render their activities 'a single enterprise.'" Pet. App. 54a (quoting *United States* v. *Heinemann*, 801 F.2d 86, 92 (2d Cir. 1986), cert. denied, 479 U.S. 1094 (1987)). It then determined that the evidence satisfied this standard (Pet. App. 55a):

> Faced with abundant evidence that Lazar had paid bribes on behalf of two firms—Datacom and Miller & Rothman—the jury could easily have found that bribery was an important, if not essential, tool in ensuring success in obtaining contracts from the PVB. The jury could then have concluded that Lazar knew that he was not simply participating in isolated bribery conspiracies but rather in the broader conspiracy charged in the indictment, a conspiracy to operate the PVB for private gain through a pattern of racketeering activity.

Nor does the court of appeals' discussion of the requirements for a RICO conspiracy conviction raise any substantial issue of law. The court's observation that a "RICO conspiracy is * * * by definition broader than an ordinary conspiracy to commit a discrete crime such as bribery" (Pet. App. 55a) is not a "perversion" of traditional conspiracy doctrine (see Pet. 24). Rather, it is an acknowledgment of what is evident on the face of the statute. The object of a RICO conspiracy, which in this case was to conduct the affairs of the PVB through a pattern of racketeering activity, is broader than the object of a traditional conspiracy, which is to commit a conventional substantive offense. The scope of the forbidden conspiracy—*i.e.*, unlawful agreement—is cor-

respondingly broader. There is no conflict between this understanding of RICO and the Fifth Circuit's decision in *United States* v. *Sutherland*, 656 F.2d 1181 (1981), cert. denied, 455 U.S. 949 (1982). *In Sutherland*, the Fifth Circuit acknowledged that "[w]hat RICO does is to provide a new criminal objective by defining a new substantive crime." 656 F.2d at 1193. Further, analyzing the result in a prior case,[8] *Sutherland* made clear that defendants who could not have been tried together before RICO because they had not agreed to commit any particular crime could be named as co-defendants under RICO when "the evidence established an agreement to commit a substantive RICO offense, *i.e.*, an agreement to participate in an enterprise through a pattern of racketeering activity." *Ibid.* Both courts agree, therefore, that in this sense a RICO conspiracy is "broader" than a traditional conspiracy.

Under both the court of appeals' decision in this case and *Sutherland*, the issue is whether there was a conspiracy among all defendants to pursue the broad objective prohibited by RICO. Consistent with black-letter conspiracy law, this standard does not require the government to prove that there was "an actual agreement among the various conspirators, or even actual knowledge of each other, in order to establish a single conspiracy" (656 F.2d at 1190) or that each member has "conspire[d] directly with each other member" (Pet. App. 54a). Further, a conspiracy may be shown by evidence that "each

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[8] *United States v. Elliott*, 571 F.2d 880 (5th Cir.), cert. denied, 439 U.S. 953 (1978). There is no merit, therefore, to Lazar's contention that *Sutherland*'s handling *of Elliott* raises a conflict with the reliance by the court below on a quotation from it. See 88-250 Pet. 25.

defendant must necessarily have known that others were also conspiring to violate RICO." 656 F.2d at 1194; see Pet. App. 55a. *Sutherland* and *United States* v. *Cryan*, 490 F. Supp. 1234 (D.N.J.), aff'd mem., 636 F.2d 1211 (3d Cir. 1980), were cases in which no such showing had been made.[9] In this case, the court of appeals found the evidence sufficient to sustain such a finding. There is, therefore, no conflict in the governing legal principles applied below and in *Sutherland*.

3. Petitioner Friedman claims (88-278 Pet. 12-21) that the district court violated his Sixth Amendment right to confront the witnesses against him with its evidentiary rulings and its handling of his trial counsel's alleged conflicts of interest. Those claims, however, do not present any issue deserving of this Court's review. The court of appeals examined each of the alleged errors at length and concluded that none of them had any material impact on the trial.

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[9] In *Sutherland*, in fact, the government did not attempt to prove that each of two individuals who had separately bribed a single judge "agreed with each other to participate in a bribery scheme with [the judge]," nor did it contend "that the nature of each defendant's agreement with [the judge] was such that he or she must necessarily have known that others were also conspiring to commit racketeering offenses in the conduct of the Municipal Court." 656 F.2d at 1194. That second theory was the one presented to the jury in this case, on proper instructions, and the court of appeals found sufficient evidence to support it.

Similarly, in *Kotteakos v. United States*, 328 U.S. 750 (1946), it was conceded that the evidence supported only a finding of multiple conspiracies. The issue before the Court was whether the variance between that proof and the theory charged in the indictment required reversal.

With respect to the subpoenas for Lindenauer's psychiatric records, both the district court and the court of appeals conducted an in camera review of the responsive documents, and both came to the conclusion that "a true psychotherapist-patient relationship existed and that nothing in the psychotherapist's notes casts any doubt upon Lindenauer's ability to understand and relate the truth" (Pet. App. 74a). The court of appeals further found that "[t]he notes contain little, if any, material that would have been useful in cross-examining Lindenauer," and that the notes "could not have had even a marginal impact upon Lindenauer's credibility" (*ibid.*). The notes were therefore irrelevant and inadmissible at trial, and the subpoena was properly quashed. See *United States* v. *Nixon*, 418 U.S. 683, 700 (1974). Similarly, the evidence of Manes' misleading statements about his first suicide attempt "had no conceivable bearing upon the credibility of his statements to Lindenauer in furtherance of the conspiracy" (Pet. App. 71a). The district court thereby properly exercised its discretion under Fed. R. Evid. 403 to exclude the evidence of those statements. Those rulings turned on the assessments by the district court and the courts of appeals of the relevance and significance of particular evidence under the circumstances of this case, not on any legal issue of general application.

Friedman's claim that his counsel was ineffective due to conflicts of interest (88-278 Pet. 17-21) is also both without merit and entirely factbound. Friedman vigorously opposed the government's motion to disqualify his trial counsel, and the court of appeals' holding that his express waiver was knowing and intelligent was clearly justified. Further, while

Friedman now contends that he was unaware of all of the facts relevant to conflicts allegedly arising from Puccio's representation of Lebetkin and the possibility that Puccio also represented Borg when both were recorded in a conversation with Driesen, the court of appeals carefully examined those alleged conflicts and found that they had had no discernible effect on the cross-examination of any witness. See pp. 8-9, *supra*. In making that determination, the court applied the standards set forth in this Court's decision in *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980). The court's conclusion that Friedman showed neither a conflict nor an adverse effect on his lawyer's performance presents no issue of general importance.

4. Finally, Friedman contends (88-278 Pet. 21-23) that the invalidation under *McNally* of the racketeering act alleging mail fraud requires reversal of his RICO convictions, even though the jury returned a special verdict finding that Friedman committed four other racketeering acts of bribery as well. Numerous courts of appeals have rejected substantially the same contention and have held that a RICO conviction will be affirmed so long as it can be determined the jury properly found a defendant guilty of at least two acts of racketeering. See, *e.g.*, *United States* v. *Anderson*, 809 F.2d 1281, 1283-1285 (7th Cir. 1987); *United States* v. *Lopez*, 803 F.2d 969, 975-977 (9th Cir. 1986), cert. denied, 481 U.S. 1030 (1987); *United States* v. *Pepe*, 747 F.2d 632, 664 (11th Cir. 1984); *United States* v. *Ruggiero*, 726 F.2d 913, 922-923 (2d Cir.), cert. denied, 469 U.S. 831 (1984); *United States* v. *Peacock*, 654 F.2d 339, 348 (5th Cir. 1981), modified on other grounds, 686 F.2d 356 (5th Cir. 1982), cert. denied, 464 U.S. 965 (1983). The jury's special verdict in this case estab-

lished that it found that Friedman had engaged in a pattern of racketeering activity, consisting of more than the required number of predicate offenses, even without considering the racketeering act of mail fraud.[10]

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[10] Friedman's reliance (88-278 Pet. 23) on *United States* v. *Brown*, 583 F.2d 659, 669 (3d Cir. 1978), cert. denied, 440 U.S. 909 (1979), is misplaced. In that case, the RICO counts alleged as acts of racketeering were four other substantive counts in the indictment. The Third Circuit held that reversal of the convictions on two of these substantive counts required reversal of the RICO counts as well, because it would be impossible to determine which of the counts the jury relied on in finding a pattern of racketeering activity. Here, however, use of a special verdict revealed that the jury relied on five separately alleged racketeering acts in finding a pattern of racketeering, and only one act of racketeering was reversed on appeal. The jury's valid determination of guilt as to four racketeering acts is more than sufficient to sustain its finding of a pattern of racketeering activity. See 18 U.S.C. 1961(5) (at least two racketeering acts required to meet requirement of pattern). In *United States* v. *Boffa*, 688 F.2d 919, 939 (3d Cir. 1982), cert. denied, 460 U.S. 1022 (1983), a case decided after *Brown*, the Third Circuit upheld RICO convictions based on precisely the same analysis that was applied in this case. In *Boffa*, as in this case, the court invalidated the mail fraud offenses that served as predicate acts against several of the defendants. Nonetheless, the court did not find it necessary to reverse those defendants' RICO convictions, because the government had established more than two other, valid predicate acts against each defendant, and the jury indicated, through a special verdict, that it found the defendants to have committed those predicate offenses.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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